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Supreme Court, U.S.
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No. 94-1588

In the Supreme Court of the United States

OCTOBER TERM, 1994

THE BUCKEYE UNION INSURANCE COMPANY,
PETITIONER,

v.

EUGENE A. LEBER, RICHARD P. LEBER,
AND JUNE M. LEBER, RESPONDENTS

REPLY BRIEF FOR THE PETITIONER

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

FRITZ BYERS
824 Spitzer Building
Toledo, Ohio 43604
(419) 241-8013

ANDREW L. FREY*
KENNETH S. GELLER
Mayer, Brown & Platt
2000 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 778-0602

Counsel for Petitioner
** Counsel of Record*

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Respondents' brief in opposition to certiorari does not dispute that the Due Process Clause requires that Buckeye's legal claims be reviewed by *some* Ohio appellate court. Indeed, respondents never even mention, let alone try to distinguish, the two pivotal precedents that have squarely established this proposition. See Pet. 14-17 (discussing *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673 (1930), and *Saunders* v. *Shaw*, 244 U.S. 317 (1917)). The central point thus remains that the Ohio Supreme Court's unexpected disposition of this case, which extinguished petitioner's appeal as of right on a number of its substantial legal claims, violates fundamental tenets of due process.

Respondents' sole bases for opposing the petition are that Buckeye did not timely raise its federal claim and that it in fact did receive appellate review of its challenges to the $23

million judgment. As we show below, these assertions are demonstrably unfounded. Accordingly, the Court should summarily reverse or vacate the judgment below and remand the case to the state courts with instructions to consider and determine Buckeye's substantial legal claims that have never been addressed on appeal.

Aside from some preliminary quibbles that are not material to the issue presented,[1] respondents discuss three points whose erroneous foundations deserve a brief word in reply.

1. Respondents advance the completely untenable claim (Br. in Opp. 10-11, 20) that Buckeye failed to raise the federal question presented here at its first opportunity. But as we have explained (Pet. 10-11 & n.3), the federal due process issue did not arise in this case until the ruling of the Ohio Supreme Court, which unexpectedly cut off any appellate review of numerous substantial legal claims presented by Buckeye. Therefore, the petition for rehearing to the Ohio Supreme Court was the first opportunity to challenge the constitutionality of that court's disposition of the case. And, of course, the fact that Buckeye's federal claim was summarily rejected hardly forecloses its right to seek relief from this Court. On these points, respondents do not even mention two cases the petition discusses — *Brinkerhoff-Faris* and *Saunders* — which hold that a claim like Buckeye's is timely raised on petition for rehearing. See also *Cole* v.

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[1] These quibbles can mostly be passed over in silence, but three merit comment. Respondents contend (Br. in Opp. 2-3) that "Buckeye falsely represents" the parties found liable in the first trial, which is patently wrong (see Pet. 4); respondents claim (Br. in Opp. 3) that Buckeye "launches a due process challenge to Ohio Appellate Rule of Appellate Procedure 12(A)," which is an utter fabrication; and respondents claim (Br. in Opp. 4-5) that we misstated the terms of respondents' initial settlement, which again is simply incorrect (see Pet. 4).

Arkansas, 333 U.S. 196, 200 (1948); *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 366-67 (1932); *Ohio ex rel. Bryant* v. *Akron Park Dist.*, 281 U.S. 74, 79 (1930).[2]

2. Respondents also argue that this Court cannot undertake review of the federal due process issue because Buckeye has not shown that the decision below did not rest upon an adequate and independent state-law ground. See Br. in Opp. 12-13; see also *id.* at 7-11. The few cases cited for this proposition, however, all predate the Court's decision in *Michigan* v. *Long*, 463 U.S. 1032 (1983), which holds squarely to the contrary. It is respondents who bear the burden of showing that the decision below rests on an adequate and independent state ground that would support the result regardless of how the federal issue were determined.

Here, the Ohio Supreme Court's rejection of Buckeye's federal claim is unaccompanied by the slightest suggestion that it was based on some independent state law ground. Once again, *Brinkerhoff-Faris* and *Saunders* are on all fours with this case on this point, yet respondents make no attempt to distinguish them in this or any other respect. In any event, it is impossible to imagine what adequate and independent state ground the court below could possibly have rested upon; the only one offered by respondents — that Buckeye was tardy in raising its federal claim — is, for reasons already noted, frivolous.

3. Finally, respondents contend (Br. in Opp. 14-19) that the Ohio Supreme Court *did* consider and resolve on the merits all of Buckeye's substantial legal claims, *sub silentio*,

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[2] Respondents' baffling assertion (Br. in Opp. 20) that this longstanding rule is inapplicable here because of Buckeye's failure to cite and discuss a summary order of the Ohio Supreme Court denying rehearing in a wholly unrelated case is entirely unexplained and makes no sense whatever.

in its decision below. In advancing this contention, respondents do not point to any evidence, in the court's opinion or elsewhere, that the court below actually ruled on Buckeye's claims. Instead, respondents rely entirely on the "time-honored presumptions of judicial integrity and regularity." Br. in Opp. 17. In fact, there are powerful reasons why this Court should reject the invitation to presume away the federal due process issue in the facile manner suggested by respondents.

The following evidence rebuts the "presumption of judicial regularity" and shows that the court below did not in fact resolve Buckeye's substantial legal claims in this case:

- *First*, the Ohio Supreme Court said not a word about any of Buckeye's challenges to the massive judgment against it, despite the fact that the court wrote an opinion that quite explicitly addressed and resolved *respondents'* legal contentions. Nowhere in the court's opinion did it even refer to any claims raised by petitioner — either in its discussion or in its disposition — nor does the court's summary order denying rehearing contain any mention of those issues.

- *Second*, the Ohio Supreme Court itself characterized its disposition as limited to the claims that are actually discussed in its opinion — respondents' claims — when it concluded: "Because the court of appeals erred *in the ways discussed in this opinion*, we reverse the judgment of the court of appeals, in part, and reinstate all of the trial court's judgments." Pet. App. 9a (emphasis added).

- *Third*, the Ohio Supreme Court's own precedents would not have permitted it to consider the claims in question, for the court has long held that it "may not pass upon any question unless the record certified to this court by the Court of Appeals discloses that

such question was presented to *and passed upon* by that court." *Winslow* v. *Ohio Bus Line Co.* 148 Ohio St. 101, 73 N.E.2d 504 (1947), syllabus ¶ 5 (emphasis added).[3] Here the Court of Appeals twice held that there was no reason to decide the merits of Buckeye's other legal objections to the judgment against it once it had already held for Buckeye on the issue of the proper interpretation of the insurance policy. See Pet. 7-8; Pet. App. 50a, 27a-31a.[4] Accordingly, neither the Court of Appeals nor any other Ohio court has ever resolved those substantial legal claims on the merits.

- *Fourth*, the Ohio Supreme Court's standard practice, as we demonstrated in the petition (see Pet. 13 & n.5), is to decide only the issues ruled upon below and then to remand to allow the lower courts to resolve the remaining legal claims. In arguing that the court below deviated from that practice in this

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[3] Respondents incorrectly assert (Br. in Opp. 15 n.4) that *Winslow* was somehow rendered obsolete by the Modern Courts Amendment to the Ohio Constitution adopted in 1968. Aside from the fact that the language cited does not purport to have any such effect, the Ohio Supreme Court since 1968 has approvingly cited *Winslow* as standing for the same proposition (see, *e.g.*, *State ex rel. Wallace* v. *City of Celina*, 29 Ohio St. 2d 109, 112, 279 N.E.2d 866, 869 (1972)), and the controlling syllabus law of that case has never been overruled.

[4] In both opinions, the Court of Appeals used the same formulation to state its judgment that it need not decide the remaining legal issues on the merits: that those claims "are rendered moot, and found not well-taken" (Pet. App. 50a) and that those claims are "found not well-taken in view of this court's decision regarding other substantive assignments of error." *Id.* at 30a. It is absurd to suggest (see Br. in Opp. 3-4) that these statements evidenced a rejection of Buckeye's claims on the merits.

case, respondents would have it that the court did so in order to engage in an even more pronounced deviation from the norm — by resolving those substantial legal claims *sub silentio*. It is ironic indeed that respondents, in their effort to justify reliance on a "presumption of judicial regularity," are forced to argue that these irregular practices occurred.

- *Fifth*, the compelling evidence that the Ohio Supreme Court did not resolve Buckeye's legal claims on the merits is reinforced by the recognition that those claims raise substantial issues of insurance law. As noted in the petition, those substantial claims include (a) whether the amount of damages in a suit for alleged bad faith refusal to settle a prior suit can exceed the actual damages to the insured, (b) whether the insured's obligation of cooperation under the insurance policy is breached by settling a case without the consent of the insurer, and (c) whether the tort of bad faith can be established when five of the eleven judges to consider the case agreed with Buckeye that the policy provided no coverage at all. See Pet. 6. If an appellate court had actually considered these claims, there is strong reason to believe that it would have ruled for Buckeye; it is most unlikely that the Ohio Supreme Court would have resolved these claims *against Buckeye* without any statement that it was doing so.

In sum, Buckeye has been the victim of a grossly unfair judicial shell game in which its undisputed right to have its legal challenges to the enormous judgment against it considered by an appellate court vanished with the decision of the Ohio Supreme Court. As in *Brinkerhoff-Faris* and *Saunders*, notions of "judicial integrity and regularity" require that this case be returned to the state courts with directions to consider and pass upon Buckeye's legal claims.

Respectfully submitted.

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

FRITZ BYERS
824 Spitzer Building
Toledo, Ohio 43604
(419) 241-8013

ANDREW L. FREY*
KENNETH S. GELLER
Mayer, Brown & Platt
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Washington, D.C. 20006
(202) 778-0602

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